IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
MURPHY, P.J. AND GRIFFIN AND METER, JJ.

ESTATE OF BETTY JEAN SHINHOLSTER, Deceased, by **JOHNNIE E. SHINHOLSTER, Personal Representative,**

Plaintiff-Appellee,

v

ANNAPOLIS HOSPITAL, assumed name for **OAKWOOD UNITED HOSPITALS, INC.**, a Michigan Corporation; **ESTATE OF DENNIS E. ADAMS, M.D., Deceased**, by **KATHERINE ADAMS, Personal Representative**; and **MARY ELLEN FLAHERTY, M.D.,**

Defendants-Appellants,

Supreme Court
Nos. 123720, 123721

Court of Appeals
Nos. 225710, 225736

Wayne County Circuit Court
No. 97-709041-NH

APPELLANTS' BRIEF ON APPEAL -- APPELLANTS ESTATE OF DENNIS E. ADAMS, M.D. AND MARY ELLEN FLAHERTY, M.D.

ORAL ARGUMENT REQUESTED

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STATEMENT OF QUESTIONS INVOLVED

I. **IN THIS WRONGFUL DEATH ACTION ALLEGING MEDICAL MALPRACTICE, THE DEFENDANTS PRESENTED SUBSTANTIAL EVIDENCE SUPPORTING THEIR CLAIM THAT THE DECEDENT FAILED TO COMPLY WITH INSTRUCTIONS GIVEN BY HER PRIVATE PHYSICIAN AND FAILED TO TAKE MEDICATION PRESCRIBED TO CONTROL HER HIGH BLOOD PRESSURE OVER A PERIOD OF A YEAR PRECEDING HER FIRST CONTACT WITH THE DEFENDANT EMERGENCY ROOM PHYSICIANS, AND THAT THIS NEGLIGENCE WAS A PROXIMATE CAUSE OF HER DEATH. DID THE TRIAL COURT ERR IN INSTRUCTING THE JURY THAT THIS NEGLIGENCE ON THE PART OF THE DECEDENT COULD NOT BE CONSIDERED IN DETERMINING HER SHARE OF COMPARATIVE FAULT?**

The trial court would answer this question "No."

The Court of Appeals has answered this question "No."

The Defendants-Appellants contend the answer is "Yes."

II. **DID THE TRIAL COURT ERR IN APPLYING THE HIGHER STATUTORY CAP ON NONECONOMIC DAMAGES IN THIS WRONGFUL DEATH CASE, WHERE THE DECEDENT WAS NO LONGER SUFFERING FROM ANY OF THE PERMANENT CONDITIONS REQUIRING APPLICATION OF THE HIGHER CAP?**

The trial court would answer this question "No."

The Court of Appeals has answered this question "No."

The Defendants-Appellants contend the answer is "Yes."

III. **DID THE TRIAL COURT ERR IN DETERMINING THAT IT WAS NOT REQUIRED TO REDUCE THE JURY'S AWARD OF FUTURE DAMAGES TO PRESENT VALUE IN THIS CASE?**

The trial court would answer this question "No."

The Court of Appeals has answered this question "No."

The Defendants-Appellants contend the answer is "Yes."

STATEMENT OF FACTS

Introduction

This appeal has arisen from a wrongful death action in the Wayne County Circuit Court, where medical malpractice was alleged as the cause of Betty Jean Shinholster's death. The action was brought by Johnnie Shinholster, Mrs. Shinholster's husband, as Personal Representative of her estate. In the trial court, the case was assigned to the Honorable John A. Murphy, Circuit Judge.

The testimony in this matter has shown that Mrs. Shinholster was treated in the Emergency Room at Annapolis Hospital by the late Defendant Dennis Adams, M.D., on April 7, and 10, 1995, and by Defendant Mary Ellen Flaherty, M.D., on April 14, 1995. On these three occasions, Mrs. Shinholster had presented with complaints of dizziness and/or rushing or buzzing noises in her ears.[1] She was examined on each of these occasions and released after reporting that her symptoms had disappeared, and she felt fine.

It was determined, upon her first examination, that Mrs. Shinholster suffered from severe hypertension (high blood pressure) and she admitted that she had not taken her prescribed blood pressure medication for months. She was given a dose of Procardia in the Emergency room to control her hypertension during the first visit, and was also given a prescription for the same medication. On each of these three occasions when Mrs. Shinholster was examined by Dr. Adams and Dr. Flaherty, she was instructed to follow up with her own private physician, Dr. Normita Vicenzio, but she did not do so.

[1] Mrs. Shinholster's husband and daughter testified, at trial, that Mrs. Shinholster had also exhibited signs of slurred speech and an unsteady gait during this time frame. These symptoms were not noted or observed by either of the Defendant physicians or any of the nursing staff who saw Mrs. Shinholster on these occasions.

On April 16, 1995, two days after she was seen by Dr. Flaherty, Mrs. Shinholster returned, once again, to the Emergency Room at Annapolis Hospital. On this last visit, Mrs. Shinholster was in the process of suffering a major thrombotic stroke. As a result of this stroke, she lapsed into a coma, and died four months later on August 26, 1995.

In this lawsuit, the Plaintiff has alleged that Dr. Adams and Dr. Flaherty failed to properly diagnose and treat Mrs. Shinholster's impending stroke when she was examined in the Emergency Room on April 10, and 14, 1995, and thus, failed to prevent the subsequent stroke which eventually caused her death.[2] Specifically, Plaintiff maintained that the Defendant physicians had breached the applicable standard of care by failing to properly examine Mrs. Shinholster to determine the cause of her symptoms, and by failing to admit her to the hospital for anticoagulation therapy. In support of this theory, Plaintiff offered the testimony of a single expert, Dr. Alfred Frankel.

The Defendant physicians maintained, in their defense, that Mrs. Shinholster had been properly treated on each of the three occasions in question, and that, because her symptoms were not indicative of an impending stroke or other neurological difficulty, hospitalization and anticoagulation therapy were not called for. Dr. Adams and Dr. Flaherty testified that their treatment of Mrs. Shinholster was appropriate and consistent with the standard of care on each of the occasions in question, and the same opinion was expressed by their three expert witnesses, Dr. Mark Rosner, Dr. Bradford Walters, and Dr. Asit Gokli.

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[2] Plaintiff did not claim that Dr. Adams had breached the standard of care on April 7, 1995.

The Trial Proceedings and Testimony

A 10-day jury trial was conducted in this matter in August and September of 1999. The Defendant Physicians and the various nursing staff did not have an independent recollection of Mrs. Shinholster's visits to the emergency room when this matter was tried. Thus, the testimony concerning the circumstances of these visits and the treatment provided was based largely upon the medical records.[3] Those records and the testimony explaining them reveal that on April 7, 1995, Mrs. Shinholster appeared at the Emergency Room with complaints of dizziness and a buzzing in her right ear. She was triaged at 9:25 p.m. Her blood pressure was elevated – 186/127 – and she stated that she had not been taking her blood pressure medication for months. At 9:30 p.m., she was given a dose of Procardia to control her hypertension. At 9:40 p.m., her blood pressure was 153/78, and at 10:05 p.m. it was 144/93. (Appendix, pp. 20a-23a, 35a-40a)

Dr. Adams testified that the symptoms reported on April 7, 1995 had prompted him to address Mrs. Shinholster's hypertension as the likely cause. With her blood pressure improved after taking the dose of Procardia, Mrs. Shinholster was discharged at 10:05 p.m. with instructions to follow up with her private physician in 1 to 2 days, and to return to the Emergency Room if she experienced additional problems. Dr. Adams testified that he had called Mrs. Shinholster's private physician, Dr. Vicencio, to consult with her before prescribing the Procardia for treatment of Mrs. Shinholster's hypertension. (Appendix, pp. 21a-23a, 41a-47a)

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[3] Copies of the medical records pertaining to Mrs. Shinholster's treatment in the Emergency Room on April 7, 10, and 14, 1995, were admitted at trial as Plaintiff's Exhibit No. 1. (Appendix, pp. 406a-407a) They are included in the Appendix at pages 20a through 33a)

Mrs. Shinholster returned to the Emergency Room on April 10, 1995, and was again seen by Dr. Adams. She was triaged at 8:15 p.m. This time, she complained to the triage nurse of intermittent dizziness, since the day before, "worsening now." She denied any pain. She was pale, her skin was cool, and her pulse was irregular. Her blood pressure was normal – 114/78. (Appendix, pp. 24a-27a, 48a-51a) Dr. Adams saw Mrs. Shinholster at 10:15 p.m., and she reported that she "felt fine" at that time. His examination revealed that her vital signs were stable, and that her physical exam was "essentially within normal limits." Mrs. Shinholster indicated that she did not wish to have any diagnostic tests performed at that time, but preferred to follow up with her own physician. (Appendix, pp. 24a-27a, 50a-55a, 57a-58a, 62a)

Dr. Adams testified that the records did not include any notation of an unsteady gait. He indicated that this would have been noted, if observed, as this might have indicated a neurological problem. (Appendix, pp. 59a-61a, 71a-73a) He indicated that Mrs. Shinholster's blood pressure, although lowered, was still uncontrolled on April 10, 1995, and he had felt that her dizziness was probably caused by the lowering of her blood pressure. (Appendix, pp. 65a, 69a-70a) Again, Mrs. Shinholster was released with instructions to take the prescribed Procardia, and to follow up with her private physician. (Appendix, pp. 25a-27a, 66a, 73a)

Dr. Adams testified, on re-direct examination, that he had been told that the prescription for Procardia given to Mrs. Shinholster on April 7, 1995 had not been filled. (Appendix, pp. 76a-77a) Records obtained from Arbor Drugs, admitted as Defendants' Exhibit No. 2, showed that prescriptions had been filled on April 5, 1994 and August 26, 1994, but contained no indication that the prescription of April 7, 1995 had been filled. (Appendix, pp. 79a-80a)

Mrs. Shinholster returned to the Emergency Room four days later on April 14, 1995, and was seen, this time, by Dr. Flaherty. Mrs. Shinholster was triaged at 11:38 p.m. She reported palpitations and feeling "woozy," and complained of rushing sounds in her ear. Mrs. Shinholster also complained that her blood pressure was increased, and said she thought her medications might be reacting with each other. At triage, her blood pressure was 143/119, but was found to be 140/80 twenty minutes later, without any intervening treatment. (Appendix, pp. 29a-30a, 151a-153a, 154a-155a)

Mrs. Shinholster was examined by Dr. Flaherty at approximately midnight. Although Dr. Flaherty was aware of the fluctuating blood pressure, Mrs. Shinholster's irregular heartbeat caused her to suspect a heart problem. She also suspected that Mrs. Shinholster's symptoms might have been caused by her use of Hismanal, which had been known to cause heart palpitations. Dr. Flaherty ordered several tests, including a complete blood count, a glucose test, electrolytes, a CBKMB, a CPK, a carotid ultrasound, and cardiac monitoring. She also performed a physical examination, which revealed no problems, other than the irregular heartbeat. The tests ruled out the possibility of a heart attack. At approximately 2:10 a.m., after a second EKG had ruled out the risk of a heart attack and Mrs. Shinholster reported feeling better, she was discharged with instructions to discontinue her use of Hismanal, and to follow up with her own doctor. (Appendix, pp. 29a-33a, 156a-164a, 165a-174a, 176a-178a)

Dr. Flaherty testified that Mrs. Shinholster did not exhibit any signs of speech difficulty, weakness, vertigo, or gait disturbance when she examined her on April 14, 1995. She observed no sign of posterior circulation insufficiency at that time. (Appendix, pp. 176a-178a)

Plaintiff's expert, Dr. Alfred Frankel, is an emergency room physician from Florida, who derives approximately 25% of his income from review of medical malpractice cases and providing expert testimony. He is board certified in emergency medicine. (Appendix, pp. 82a-86a, 148a-149a) Dr. Frankel opined that Mrs. Shinholster's condition on April 10, and 14, 1995 suggested that she was suffering from a transient ischemic attack, or TIA, a precursor of an ischemic stroke. He expressed his opinion that treatment of this condition required hospitalization for anticoagulation therapy, specifically intravenous administration of Heparin, a blood-thinning medication, and that Dr. Adams and Dr. Flaherty had both breached the standard of care by their failure to provide this treatment. (Appendix, pp. 87a-140a)

Dr. Mark Rosner, an emergency room physician at Beaumont Hospital, testified as an expert for the defense. He, also, is board certified in emergency medicine. (Appendix, pp. 201a-204a) Having reviewed all of the relevant records and materials, Dr. Rosner expressed his opinion that Mrs. Shinholster had been properly treated on April 10, and 14, 1995, and that there had been no breach of the standard of care by Dr. Adams or Dr. Flaherty. (Appendix, pp. 205a-266a, 270a)

Dr. Bradford Walters, another emergency room physician, also testified as an expert for the defense. He is board certified in emergency medicine and a Fellow of the American College of Emergency Medicine. (Appendix, pp. 272a-277a) He, also, opined that Mrs. Shinholster had been properly treated on April 10, and 14, 1995, and that there had been no breach of the standard of care by Dr. Adams or Dr. Flaherty. (Appendix, pp. 278a-323a, 325a-332a)

The third expert called for the defense was Dr. Asit Gokli, the Chairman of Emergency Medicine at St. Mary's Hospital. Dr. Gokli is board certified in both internal

medicine and emergency medicine. (Appendix, pp. 378a-380a) He, also, expressed his opinion that Mrs. Shinholster had been properly treated, and that there had been no breach of the standard of care by Dr. Adams or Dr. Flaherty. (Appendix, pp. 381a-405a) Indeed, Dr. Gokli felt that it would have been malpractice to administer Heparin in this case because it increases the risk of internal bleeding, particularly in patients suffering from hypertension. (Appendix, pp. 395a-396a, 405a)

The jury also heard testimony from Mrs. Shinholster's private physician, Dr. Vicencio, concerning her history of treatment of Mrs. Shinholster's high blood pressure, and Mrs. Shinholster's non-compliance with medical advice, during the year preceding her treatment by Dr. Adams and Dr. Flaherty.[4] Dr. Vicencio testified that she had first seen Mrs. Shinholster when she visited the Emergency Room at Annapolis Hospital on April 8, 1994 – a year before her contacts at issue in this case. Mrs. Shinholster admitted, at that time, that she had not been taking her blood pressure medication. Mrs. Shinholster did not have a regular family physician at that time, so Dr. Vicencio agreed to take her on as a patient. Dr. Vicencio continued to treat Mrs. Shinholster's hypertension until September 9, 1994. (Appendix, pp. 183a-185a)

Dr. Vicencio testified that she had prescribed Procardia when she first saw Mrs. Shinholster on April 8, 1994. She returned for an appointment at Dr. Vicencio's office on April 27, 1994. Dr. Vicencio continued Mrs. Shinholster on her medication, but added Altace because her hypertension was still uncontrolled. (Appendix, pp. 185a-186a, 188a-190a) Dr. Vicencio saw Mrs. Shinholster again on May 18, and 27, 1994, and continued her on her

[4] Dr. Vicencio's videotaped deposition testimony was played for the Jury on September 2, 1999. (Appendix, pp. 180a-181a)

medication. On May 18, 1994, Dr. Vicencio substituted Hytrin, another form of blood pressure medication, for the Altace, because Mrs. Shinholster reported that she had not been taking the Altace. On May 27, 1994, Dr. Vicencio asked Mrs. Shinholster to return for another appointment in June, but she did not return until August 12, 1994. (Appendix, pp. 185a-187a, 190a-192a)

Dr. Vicencio testified that Mrs. Shinholster's blood pressure was 160/110 – still uncontrolled – when she saw her again on August 12, 1994. Mrs. Shinholster indicated, on that date, that she had not been taking the Hytrin for a month. (Appendix, pp. 192a-193a) Mrs. Shinholster returned for another appointment on August 26, 1994, and her blood pressure was 160/104 – still uncontrolled – at that time. (Appendix, p. 194a) Dr. Vicencio testified that her last contact with Mrs. Shinholster before the alleged malpractice was on September 9, 1994. Her blood pressure was 150/100 on that date – lower than before, but still higher than Dr. Vicencio wanted to see. (Appendix, pp. 187a, 194a-195a) Dr. Vicencio asked Mrs. Shinholster to return again in two weeks, but she did not. (Appendix, p. 196a)

Dr. Vicencio testified that Mrs. Shinholster had high cholesterol, and was a smoker. She indicated that smoking and high blood pressure are known risk factors for stroke, and that she usually tells her patients to stop smoking if they have high blood pressure or heart disease. (Appendix, p. 197a) Dr. Vicencio indicated that she had warned Mrs. Shinholster of the risks associated with her high blood pressure, and emphasized to her the need for continued monitoring and treatment of that condition. She stated that Mrs. Shinholster was "quite intelligent," and thus, she had felt that Mrs. Shinholster had understood these warnings. (Appendix, pp. 198a-199a)

By this and other testimony, the Defendants sought to demonstrate that Mrs. Shinholster's failure to follow her doctor's advice, including her failure to take her prescribed blood pressure medication, had contributed as a proximate cause of the stroke which ultimately caused her death. Plaintiff's counsel objected to this during the testimony of Dr. Walters, arguing that evidence of Mrs. Shinholster's non-compliance before her first contact with the Defendant physicians on April 7, 1995 could not be considered by the jury as evidence of Mrs. Shinholster's comparative fault. (Appendix, pp. 320a-323a) The jurors were excused, and this issue was discussed out of their presence. (Appendix, pp. 344a-376a)

In the absence of the jury, Dr. Walters was questioned as to whether Mrs. Shinholster's non-compliance was a cause of her death, and he expressed his opinion that it was a contributing cause:

> "THE COURT: Well, let's find out from this doctor since the jury is out.
>
> "I have a question about this in my notes here whether or not we can – Is he prepared to say whether or not the failure to follow-up with the doctor, the treating doctor, Dr. Vicenzio was a proximate cause of the stroke or whether or not the failure to take the Procardia – I believe that's the medication prescribed on the 7th prescribed by Dr. Adams – whether that was the proximate cause of the stroke.
>
> "Let's take them one at a time. If you have an opinion, if you have thought about this issue.
>
> "THE WITNESS: Sure. I have thought about it.
>
> "Its' real difficult to pinpoint quite as precisely as that.
>
> "Did follow-up cause – Would her following up with her family physician absolutely prevent – ended the stroke? It's impossible to say with adequate precision because any patient might like her with high blood pressure in her age group with her anatomy was at risk for a stroke. And even under the best of treatment she could still have a stroke even if she was absolutely precisely following up with the family physician. So that is possible.

"Did it contribute? Yes. It probably did because following up with a family physician and getting continued care would have probably brought her blood pressure into better control. And by taking her medications intermittently that jacked her blood pressure down. Then she stopped and her blood pressure rises up. It's sort of like a hammer."

(Appendix, pp. 357a-359a)

* * *

"THE COURT: But right now I'm seeking in terms of reasonable degree of medical certainty.

"Do you have an opinion whether or not the taking of the Procardia as prescribed by Dr. Adams would have had – would have prevented or allowed you to say she wouldn't have this stroke?

"THE WITNESS: I just think within a reasonable degree of medical certainty, yes. Had she taken her medications as prescribed the blood pressure would have been in better control, and she would have had a better chance of not having a stroke."

(Appendix, pp. 361a-362a)

After hearing further arguments of counsel, Judge Murphy expressed his agreement with Plaintiff's argument that the jury should not be permitted to consider evidence of Mrs. Shinholster's non-compliance before April 7, 1995 as evidence of her comparative fault in this matter. He indicated that the jurors' consideration of this evidence would be limited to aiding their determination of whether or not Mrs. Shinholster had failed to comply with the instructions given by these Defendants on or after April 7, 1995. (Appendix, pp. 372a-376a)

When the jury returned, Dr. Walters continued to testify as follows:

"Q. Does Mrs. Shinholster have a duty to take her medication as prescribed?

A. She does.

Q. Does she have a duty to see her family physician as recommended by her emergency care physician?

A. Yes, she does.

Q. I want you to assume for this next question that as of April 7, 1995 and continuing through April 16th, 1995 when Mrs. Shinholster went into the hospital, I want you to assume that she did not take her Procardia as prescribed .

A. So assumed.

Q. I want you to assume she maintained her normal habit and routine regarding that, and she only took it when she didn't' feel well?

A. I will assume that.

Q. Assuming that to be true, do you have an opinion based upon a reasonable degree of medical certainty that Mrs. Shinholster's failure to take the Procardia as prescribed from April 7 through April 16, 1995 was a proximate cause of her stroke and ultimate death?

A. I think it was one of the reasons, yes. It was a proximate cause.

Q. Why would her failure to take her medication as prescribed be a proximate cause of her stroke and death?

A. One of the worst things that can happen to a patient who has high blood pressure is to take their medication intermittently. The blood pressure comes down. The medication wears off. The blood pressure soars up. The blood pressure comes down. If and when they take it again, it's sort like a hammer hit to the brain each time that happens.

When blood pressure medications are taken on a regular basis there's a much smoother lowering of blood pressure and you don't get those spikes up and down and up and down.

Those spike up and down can possibly cause what happened to Mrs. Shinholster and a stroke like this."

(Appendix, pp. 326a-328a)

* * *

"Q. As I understand your testimony, are you saying that Betty Shinholster was negligent?

A. Well, it's an interesting concept to consider the Plaintiff negligent. And I suppose in the context, yes.

My understanding is she didn't take her medications. My understanding is she took medications that were not prescribed for her. My understanding is she did not follow up with her family physician as instructed on several occasions. I would say that we are getting into – Negligence is such a heavy word. But, yes. I think I would have to say yes."

(Appendix, pp. 333a-334a)

* * *

"Q. ...My question, sir, is when she walked into the door she said I have not been taking my medications for months.

That's what she said, right?

A. Yes. That's my understanding.

Q. And on April 10th she told somebody she was taking Procardia, didn't she?

A. Correct.

Q. So one of the things you have problem with Betty Shinholster is she must not have been taking her meds as prescribed. Is that what you believe?

A. That's what I believe.

Q. Do you believe that caused her death?

A. I believe it was one of several factors. Whether I can say it is the cause, the ultimate cause, would be nice for black and white purposes. But nothing is quite that black and white. But I think it was one part of a zig (sic) saw puzzle, and that was definitely one piece.

Q. Let me ask you this, sir: If she had taken her blood pressure medication exactly as the doctor told her to do you believe she would be alive?

A. I think there was a good chance that she may have been."

(Appendix, pp. 335a-336a)

Dr. Frankel's testimony also supported the Defendants' claim that Mrs. Shinholster's non-compliance was a contributing cause of her death. Dr. Frankel acknowledged that Mrs. Shinholster had been non-compliant in taking her medication despite Dr. Vicencio's warnings as to the risks of high blood pressure. (Appendix, pp. 142a-143a) Dr. Frankel acknowledged the important role that a family physician plays in stroke prevention, and acknowledged, further, that the patient also plays an "extremely important" role. (Appendix, pp. 145a-146a)

When jury instructions were discussed after the completion of the proofs, Judge Murphy reaffirmed his prior ruling that the jury would not be permitted to consider evidence of Mrs. Shinholster's non-compliance with medical advice occurring prior to April 7, 1995. He indicated that SJI2d 11.01, the standard instruction on comparative negligence, would be modified in accordance with his ruling limiting the jury's consideration of that evidence. Defendants' counsel again noted their objection. (Appendix, pp. 409a-431a)

The modified instruction on comparative negligence was subsequently given to the jury as follows:

> "It was the duty of the Plaintiff in connection with this occurrence to use ordinary care for her own safety.
>
> "Members of the jury, the total amount of the damages that the Plaintiff would ever be entitled to recover will be reduced by the percentage of Plaintiff's negligence after April 7th, 1995, that contributed as a proximate cause to her injury.
>
> "The Plaintiff however is not entitled to noneconomic damages if she is more than 50 percent at fault for her own injury. This is called or known as comparative negligence.
>
> "Members of the jury, there was evidence in this case regarding the medical habits of the deceased as to whether she followed Dr. Vicenzio's orders and took her medications properly prior to her treatment with Defendant doctors. This evidence may not be the basis for any findings that the deceased was comparatively negligent before April 7, 1995 the date she sought treatment from the Defendants.

"You may consider this as evidence only in determining whether she filed [sic] the orders of Defendants Adams and Flaherty and other staff members of the hospital."

(Appendix, pp. 444a-445a)

The Judgment and Post-Judgment Proceedings

At the conclusion of the trial on September 14, 1995, the jury returned a verdict in favor of the Plaintiff against all Defendants. The jury awarded past economic damages in the amount of $220,000.00, and past noneconomic damages in the amount of $564,000.00. Future economic damages in the amount $9,700.00 per year were awarded for the years 1999 through 2003, and future noneconomic damages in the amount of $62,500.00 were awarded for each of those years. Mrs. Shinholster's comparative fault was assessed at 20%. Dr. Adams was found to be 50% at fault, and Dr. Flaherty's fault was found to be 30%.[5]

A written Judgment was subsequently entered on January 4, 2000. (Appendix, pp. 488a–490a) That Judgment incorporated a reduction for the jury's finding of Mrs. Shinholster's comparative fault, but did not include any application of the statutory cap on noneconomic damages, nor did it include any reduction of the future damages to present value or any reduction for collateral source payments.

The Defendants filed a timely motion for post-judgment relief, which was argued before the trial court on February 11, 2000, and denied by its "Opinion and Order Denying Defendants Motion for New Trial/Remittitur/Modification of Judgment" subsequently entered on February 14, 2000. (Appendix, pp. 491a-503a) In that Opinion and Order, Judge Murphy denied the Defendants' request for a new trial, and also rejected their claims that: 1) The jury's award of noneconomic damages should be limited in accordance with the lower cap set

[5] Jury Verdict Form (Appendix, pp. 483a-487a)

forth in MCL 600.1483[6]; 2) The award of future damages must be reduced to present value; and 3) Defendants were entitled to a collateral source reduction corresponding to the amounts which had been paid by the Medicaid program for Mrs. Shinholster's medical bills.

On March 6, 2000, Defendants Dennis Adams, M.D. and Mary Ellen Flaherty, M.D claimed an appeal to the Court of Appeals from the trial court's Judgment of January 4, 2000, and its February 14, 2000 Opinion and Order denying their post-judgment motions.[7] Defendant Annapolis Hospital filed a separate appeal from the same Judgment and Order denying post-judgment relief, which was assigned Court of Appeals docket number 225710. These appeals were consolidated by the court's Order of August 3, 2000.

In the Court of Appeals, Defendants Flaherty and Adams raised six claims of error: 1) That the trial court's modified instruction on comparative negligence improperly restricted the jury's consideration of the decedent's comparative fault; 2) That Plaintiff's expert was insufficiently qualified to express an opinion as to Mrs. Shinholster's life expectancy; 3) That the Defendants were denied a fair trial by an erroneous jury instruction which invited the jury to determine Mrs. Shinholster's life expectancy based upon a repealed statutory mortality table; 4) That the trial court incorrectly determined that the higher of the statutory caps on noneconomic damages was to be applied in this case, where the statutory criteria for application of the higher cap were not met; 5) That the trial court erroneously declined to reduce the jury's award of future damages to present value; and 6) That the trial court

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[6] Although the trial court determined, in its Opinion and Order of February 14, 2000, that the higher cap applied, no Amended Judgment has yet been entered in accordance with that finding.

[7] Dr. Adams died while the appeals were pending in the Court of Appeals, and Katherine Adams, the Personal Representative of his estate, has been substituted as a Defendant in his place.

erroneously refused to apply a collateral source reduction for medical expenses paid by the Medicaid program.

The consolidated appeals were argued in the Court of Appeals in July of 2002 before Judge William B. Murphy, as Presiding Judge, and Judges Patrick M. Meter and Richard A. Griffin. On February 14, 2003, the Court of Appeals issued its Opinion, designated for publication. (Appendix, pp. 504a-525a) In that Opinion, authored by Judge Meter, the court rejected all of the Appellants' claims of error, thereby affirming the trial court's decisions as to all of the aforementioned issues, and remanded the matter to the trial court for entry of an amended judgment for a sum certain in accordance with its Opinion. Defendants Flaherty and Adams filed a timely Motion for Rehearing on March 7, 2003. A timely Motion for Rehearing was also filed by Defendant Annapolis Hospital in the consolidated appeal. These motions for rehearing were denied by the Court of Appeals by its Order issued on April 1, 2003. (Appendix, p. 526a)

Defendants-Appellants Mary Ellen Flaherty, M.D. and Katherine Adams, Personal Representative of the Estate of Dennis E. Adams, M.D. sought leave to appeal the aforementioned decisions of the trial court and the Court of Appeals to this Honorable Court pursuant to MCR 7.302. Their application focused upon three of the six issues raised in the Court of Appeals: 1) That a new trial should be granted because the trial court's modified instruction on comparative negligence improperly restricted the jury's consideration of the decedent's comparative fault; 2) That the lower statutory cap on noneconomic damages must be applied in the calculation of any judgment entered in this wrongful death case, where the statutory criteria for application of the higher cap do not apply; and 3) that any award of

future damages must be reduced to present value pursuant to MCL 600.6306 in this case, where the exceptions provided in MCL 600.6311 do not apply.

This Court granted Appellants' Application for Leave to Appeal by its Order of November 21, 2003. (Appendix, pp. 527a-528a)

LEGAL ARGUMENT

I. THE DEFENDANTS WERE DENIED A FAIR TRIAL BY THE TRIAL COURT'S INSTRUCTION ON COMPARATIVE NEGLIGENCE, WHICH IMPROPERLY RESTRICTED THE JURY'S CONSIDERATION AND PROPER ALLOCATION OF THE DECEDENT'S COMPARATIVE FAULT.

In this wrongful death action alleging medical malpractice as the cause of the decedent's death, the Defendants presented substantial evidence showing that Mrs. Shinholster had failed to comply with instructions given by her private physician and failed to take medication prescribed to control her high blood pressure over a period of a year preceding her first contact with the Defendant emergency room physicians. Indeed, it was undisputed that Mrs. Shinholster had not been taking her medication for months, and this was freely acknowledged by Plaintiff's counsel in her opening and closing arguments. The Defendants also presented substantial evidence suggesting that Mrs. Shinholster's death was caused, at least in part, by this continuing noncompliance with sound medical advice. All of the experts agreed that the stroke which ultimately led to Mrs. Shinholster's death was likely caused, in large part, by her high blood pressure – a condition which could have been controlled by the medication prescribed for her, had she taken it as directed.

The jury was not allowed to properly consider this evidence of Mrs. Shinholster's negligence in determining her comparative fault. At the request of Plaintiff's counsel, and

over the Defendants' vigorously stated objections, the trial court erroneously ruled that, in determining Mrs. Shinholster's share of comparative fault, the jury could only consider Mrs. Shinholster's failure to follow medical advice after her first contact with Dr. Adams on April 7, 1995. Standard Jury Instruction 11.01 was modified to instruct the jury in accordance with the court's ruling. Thus, the jurors were precluded from allocating any fault to Mrs. Shinholster for her failure to follow her doctor's advice, including her failure to take the medication prescribed to control her dangerously high blood pressure, prior to April 7, 1995.

The trial court's ruling and the resulting modification of the standard jury instruction were clearly contrary to Michigan law which requires, without exception, that the trier of fact make a full allocation of comparative fault between all parties and non-parties responsible for causing the injury at issue in actions where damages are sought for personal injury or wrongful death. The trial court's instruction as to this issue was reversibly erroneous in light of the substantial evidence that Mrs. Shinholster's noncompliance with medical advice was a proximate cause of her death. The Defendants have been denied their right to have their responsibility determined in accordance with the facts and the law, and for this, they should be granted a new trial.

A. THE STANDARDS OF REVIEW

Pertinent portions of the Michigan Standard Jury Instructions must be given if they are applicable, accurately state the applicable law, and are requested by a party. MCR 2.516(D)(3). To determine whether a comparative negligence instruction is appropriate, the court must view the evidence most favorably to the defendant and determine whether there is sufficient evidence for the jury to find negligence on the part of the injured plaintiff. Stachurski v K Mart, 180 Mich App 564, 570; 447 NW2d 830 (1989) This issue, however, is

much more than a simple question of whether the requested instruction was warranted by the evidence presented. It presents a question of law, and to the extent that the trial court's ruling represents a ruling on a legal question, its decision is reviewed *de novo*. It is well settled that questions of law, including questions of statutory construction, are reviewed *de novo*. Haberkorn v Chrysler Corporation, 210 Mich App 354, 371; 533 NW2d 373 (1995).

B. THE STATUTORY REQUIREMENT FOR ALLOCATION OF COMPARATIVE FAULT

The tort reform legislation of 1986 and 1995 has eliminated previously existing inequities in favor of new requirements designed to ensure that parties are held liable for their negligent acts or omissions in direct proportion to their own individual fault. Prior to 1979, the doctrine of contributory negligence denied recovery to a plaintiff whose negligence contributed, however slightly, as a cause of the injury at issue. This harsh rule was changed by this Court's decision in Placek v Sterling Heights, 405 Mich 638; 275 NW2d 511 (1979), which substituted the doctrine of comparative negligence for the doctrine of contributory negligence. Consistent with Placek, the 1986 tort reform legislation – 1986 P.A. No. 178 – added a new section MCL 600.6304, which required that specific findings be made as to the percentages of comparative fault of all parties, including the plaintiff, and that judgment be entered in accordance with those findings.

Although this was a great improvement, the doctrine of joint and several liability and the inability to apportion comparative fault among responsible non-parties continued to unfairly penalize many defendants in personal injury actions. These issues were addressed by the 1995 tort reform legislation – 1995 P.A. Nos. 161 and 249. These amendatory acts eliminated joint and several liability, with a few narrowly defined exceptions, and adopted new provisions requiring apportionment of comparative fault among all parties and non-

parties having responsibility for causing the injury. By these changes, the Legislature has reiterated and clarified its preference for imposing civil liability for personal injury or wrongful death in direct proportion to each party's individual fault.

It is useful, at the outset, to review the pertinent statutory provisions. MCL 600.2957 now provides, in subsection (1), that:

> "In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action."

MCL 600.2959 provides that:

> "In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the court shall reduce the damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306. If that person's percentage of fault is greater than the aggregate fault of the other person or persons, whether or not parties to the action, the court shall reduce economic damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306, and noneconomic damages shall not be awarded."

MCL 600.6304 was amended by the 1993 medical malpractice tort reform legislation – 1993 P.A. No. 78 – and the subsequent tort reform legislation of 1995. Additional pertinent provisions requiring apportionment of comparative fault are set forth in subsections 6304(1), (2), (3) and (8), and MCL 600.6306(3). Section 6304 now provides, in subsections (1), (2) and (3) that:

> "(1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:

(a) The total amount of each plaintiff's damages.

(b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under section 2925d, regardless of whether the person was or could have been named as a party to the action.

"(2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed.

"(3) The court shall determine the award of damages to each plaintiff in accordance with the findings under subsection (1), subject to any reduction under subsection (5) or section 2955a or 6303, and shall enter judgment against each party, including a third-party defendant, except that judgment shall not be entered against a person who has been released from liability as provided in section 2925d."

MCL 600.6306, pertaining to determination of the order of judgment, provides, in subsection (3), that:

"If the plaintiff was assigned a percentage of fault under section 6304, the total judgment amount shall be reduced, subject to section 2959, by an amount equal to the percentage of plaintiff's fault. ..."

Subsection 6304(8), added by the 1995 legislation, broadly defines "fault" to include any act or omission that is a proximate cause of an injury sustained by a party:

"As used in this section, "fault" includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party."

These provisions clearly require an apportionment of fault between all parties, including the plaintiff, in all actions seeking damages for personal injury or wrongful death. There are no exceptions provided for medical malpractice cases. Pursuant to § 6304(2), the trier of fact must "consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed." Under § 6304(8),

the "fault" to be allocated includes any act or omission "that is a proximate cause of damage sustained by a party."

C. RECENT MICHIGAN AUTHORITIES HAVE HELD THAT THE PLAINTIFF'S COMPARATIVE FAULT IS A DEFENSE IN MEDICAL MALPRACTICE CASES.

Recent decisions of the Court of Appeals have held, consistent with the doctrine of comparative negligence and the aforementioned statutory framework, that comparative negligence is a defense in medical malpractice cases. *See:* Colbert v Primary Care Medical, P.C., 226 Mich App 99; 574 NW2d 36 (1997); Jalaba v Borovoy, 206 Mich App 17; 520 NW2d 349 (1994); Pietrzyk v City of Detroit, 123 Mich App 244; 333 NW2d 236 (1983).

D. PLAINTIFF'S POSITION IS NOT SUPPORTED BY THE DECISIONS CITED IN SUPPORT.

In the lower courts, Plaintiff's counsel have relied primarily upon this Court's decision in Podvin v Eikhorst, 373 Mich 175; 128 NW2d 523 (1964), in support of their argument that Mrs. Shinholster's negligence prior to April 7, 1995 could not be considered in the allocation of her comparative fault. In that case, the plaintiff alleged medical malpractice for the defendants' treatment of a spinal injury suffered in an automobile accident. Although none of the parties had claimed that contributory negligence was an issue in the case, defense counsel made comments in their opening and closing arguments suggesting that the accident, and thus, the injury, had been caused by the plaintiff's negligence.

To counter the negative effect of these comments, the plaintiff's counsel requested an instruction that the plaintiff's fault in causing the accident was not an issue, and should not be considered. The trial court refused to give the requested instruction, and the plaintiff complained that this refusal had been erroneous on appeal from the jury's verdict of no cause

of action. Having already determined that reversal was required by the trial court's comments which improperly disparaged the plaintiff's documentary evidence in the jury's presence, the Court went on to state that the refusal of this instruction was also erroneous. Noting that the issue of contributory negligence was not involved in the case, the Court indicated that the plaintiff's timely request for an instruction to that effect should have been granted.

This Court's decision in Podvin does not support the Plaintiff's position in this case for a number of reasons. First, the Court's discussion of this issue was *dictum*, as it was not necessary to the Court's holding that reversal was required for the Court's disparaging comments. Second, and most importantly, the Court's opinion does **not** state that a plaintiff's contributory negligence prior to the medical treatment in question cannot be relevant, as a matter of law, in a medical malpractice case. The Court's opinion merely states that the issue of contributory negligence was not involved in the case, and that none of the parties had made any claim to the contrary. The Court's opinion does not provide any explanation as to why the plaintiff's contributory negligence was not an issue. It is possible that no evidence was presented which could have supported a claim of contributory negligence. It is also possible that contributory negligence, which would have barred the plaintiff's claim entirely under the law existing at the time, was not pled as an affirmative defense.

Finally, it must be recalled that Podvin was decided in 1964, long before the adoption of the doctrine of comparative negligence in Placek, and long before the aforementioned tort reform legislation which now requires a full weighing and apportionment of the plaintiff's comparative fault. Thus, if ever there was a rule in Michigan that a plaintiff's negligence

before medical treatment could not be considered by the trier of fact, that rule was overruled, both judicially and legislatively, long ago.[8]

Plaintiff's counsel have also relied upon Sawka v Prokopwycz, 104 Mich App 829; 306 NW2d 354 (1981). In that case, where the malpractice alleged was a failure to properly diagnose lung cancer, the jury was allowed to hear evidence that the plaintiff had failed to return for follow-up examinations and continued to smoke after being warned to quit. The trial court instructed the jury that the defendants' burden with regard to the deceased's negligence was to show that this negligence was a proximate contributing cause of the injuries. Citing Podvin, the Court of Appeals held that the trial court's instruction was deficient because it did not inform the jury that contributory negligence was not to be considered in ascertaining the defendant's liability in the malpractice action. 104 Mich App at 837-838

Plaintiff's position is not supported by Sawka for many of the same reasons. First, the Court's decision appears to have been based upon Podvin and the assumption that it precluded consideration of the decedent's contributory negligence. As noted previously, this Court's decision in Podvin does not establish such a rule. Second, the action involved in Sawka appears to have been tried prior to the adoption of the comparative negligence doctrine. The opinion repeatedly refers to the plaintiff's negligence as contributory negligence, and states that the defendants' counsel made motions for directed verdict on grounds of contributory

[8] There is, of course, a drastic difference between the harsh doctrine of contributory negligence and the more equitable doctrine of comparative negligence, which allows recovery based upon individual fault. Thus, if the issue of "pre-treatment" negligence was considered by the Court as a basis for its decision in Podvin, it is reasonable to assume that its decision may have been motivated by a desire to ameliorate the harsh results flowing from application of the contributory negligence doctrine. The subsequent abrogation of that doctrine cannot be ignored when assessing the continuing validity of any rule established in that case.

negligence. The court's opinion clearly suggests its concern that the effect of this evidence and the trial court's instruction would be to defeat, entirely, the plaintiff's cause of action. Indeed, the court noted, in its footnote No. 1, that "We express no opinion as to the propriety of an instruction which would allow the jury to consider a defense of contributory negligence in regards to setting damages once liability has been fixed." Thus, it is clear that the issue now presented in this case was not considered in Sawka.

Finally, even if Podvin or Sawka could be considered authority for the proposition that a plaintiff's contributory negligence cannot be considered by the jury in a medical malpractice case, the Court should again note that their value as precedent has been eroded by the subsequent changes in the law discussed previously. [9] Contributory negligence no longer bars a plaintiff's recovery, and the statutory law of this state now requires the trier of fact to consider and apportion the comparative fault of all parties.

The question presented in this case was addressed and properly decided by the Tennessee Supreme Court in the case of Gray v Ford Motor Company, 914 SW2d 464 (Tenn 1996), upon certification of the issue by the Sixth Circuit Court of Appeals. The question certified by the Sixth Circuit was:

> "Whether principles of comparative fault should apply in Tennessee medical malpractice actions so as to result in the apportionment of damages between the estate of a decedent who acted negligently in causing an initial injury and a physician who negligently treated the decedent for that injury"
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> 914 SW2d at 465

In Gray, the decedent's estate alleged medical malpractice arising during treatment of the deceased after an automobile accident, which caused her spleen to rupture. Evidence

[9] The Court of Appeals has recognized that Podvin and Sawka are not binding as authority in this case. Nevertheless, the Court has based its holding, in part, upon "the implications of *Podvin*." (Appendix, pp. 511a, 513a)

presented at trial suggested that the decedent had been operating her vehicle under the influence of alcohol. The jury was instructed that it should apportion liability based on the principles of comparative fault. Based on the evidence and the instruction given, the fault, and thus, the liability for damages, was apportioned between the deceased and the treating physicians.

In Gray, the court held that the doctrine of comparative fault could properly be applied to medical malpractice actions so as to require an apportionment of fault between the estate of a decedent who acted negligently in causing the original injury and a physician who acted negligently in the treatment of that injury. In so ruling, the court observed that, if the injury had been caused by the separate, independent negligent acts of the physician and another tortfeasor, the liability would be determined by the fault attributed to each, and noted that the same principle should apply where the negligence of the plaintiff is a contributing proximate cause:

> "Thus, **applying the principles of comparative fault to a medical malpractice action, a physician is liable only for that portion of the plaintiff's damages that were proximately caused by the physician's negligence.**
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> "The Court declines the invitation to reverse the decision in Volz v. Ledes, which, in the Court's view, was properly decided. In the present case, the decedent's negligence caused the accident and, incidental thereto, the ruptured spleen. The physician negligently failed to diagnose the injury. Death resulted. **There was one indivisible injury proximately caused by separate, independent acts of the plaintiff and the physician. Had the injury been caused by the separate, independent negligent acts of the physician and another tortfeasor, the liability would be determined by the fault attributed to each.** Owens v Truckstops, --- S.W.2d ---, --- (Tenn. 1996) [slip opinion at 22]. **The principle is the same where the negligence of the plaintiff is a contributing proximate cause.** Whitehead v. Toyota Motor Co., 897 S.W.2d 684 (Tenn. 1995).
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> "This case does not present, and the Court declines to address in this opinion, the rights and liabilities of the parties where there are multiple, separate injuries.

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> "In response to the certified question, the principles of comparative fault apply in Tennessee medical malpractice actions, so as to result in the apportionment of fault between the estate of a decedent who acted negligently in causing the initial injury, and a physician who acted negligently in the treatment of the decedent for that injury. The physician's liability will be limited to the percentage of the total damages attributed to his negligence."
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> 914 SW2d at 466-467 (Emphasis added)

In the case of Berlepsch v Peck, 26 Conn L Rptr 317; 2000 WL 157542 (Conn Super 2000), the court cited Gray with approval in determining that apportionment of comparative fault was required under a statutory scheme similar to Michigan's, where it was alleged that the plaintiff's injuries had been caused by the combined negligence of the treating physician and the driver of the vehicle involved in the accident causing the injury treated:

> "The question that must be addressed under § 52-572h(c) is whether "the damages are determined to be proximately caused by the negligence of more than one party." The statute does not distinguish between negligence occurring at different times or between different categories of negligence. The focus is on "the damages." In a case involving multiple tortfeasors, damages may be proximately caused by more than one tortfeasor, even when the tortfeasors act independently.
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> "The present case is a good example. **It is, at the very least, plausible that in an automobile accident followed by medical malpractice, a plaintiff may sustain a single indivisible item of damage proximately caused by both tortfeasors. If such an indivisible injury caused by two different tortfeasors is found to exist, the jury may apportion the damages under the statute.** (Apportionment would not, of course, apply to damages found by the factfinder to have been exclusively caused by one tortfeasor or the other.) See Gray v. Ford Motor Co., 914 S.W. 2d 464, 467 Tenn. 1996) The plain text of § 52-572h(c) requires this conclusion. This analysis is bolstered by the fact that the legislature, in enacting § 52-572h, "was focused on the protection of insurable interests." Bhinder v Sun Co., supra, 246 Conn. at 234. Both drivers of motor vehicles and doctors sued for negligence have insurable interests. Apportionment is consequently allowed in this scenario if the plaintiff's damages are found to be proximately caused by the negligence of each tortfeasor."
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> 26 Conn L Rptr at 318 (Emphasis added)

Like the statute at issue in Berlepsch, Michigan's statutes make no exception for medical malpractice cases, nor do they draw any distinctions between types of negligence or parties responsible. The focus, under Michigan law, is on whether the negligence of a party or non-party, including the plaintiff, was a contributing cause of the injury. Clearly, if the negligent act or omission of some other party or non-party were partially responsible for Mrs. Shinholster's death, it would be appropriate, and necessary under Michigan law, to apportion that negligence accordingly, as the courts approved in Gray and Berlepsch. This would have been appropriate, for example, if Mrs. Shinholster had been given the wrong medication by a negligent pharmacist. Had this occurred, it is clear that the Defendants' liability for damages would have been reduced in proportion to the pharmacist's degree of fault. As the Court observed in Gray, the same principle should apply in a case such as this, where the evidence can support a finding that a single indivisible injury has been caused, in part, by the decedent's own negligence.

There is no logical reason to draw a distinction, for purposes of determining proximate cause, between Mrs. Shinholster's failure to follow instructions given by these Defendants after April 7, 1995 and her failure to follow the same or similar medical advice given by her family physician, Dr. Vicencio, during the year preceding her first contact with the Defendants. Plaintiff's counsel have acknowledged, as they must, that failure to follow medical advice is properly considered evidence of comparative fault when it occurs post-treatment. The rationale is obvious; when a patient fails to follow his doctor's instructions, and that failure contributes to the injury, the patient should be held accountable for the injury resulting from that failure.

The same rationale applies with equal force in this case, where Mrs. Shinholster negligently failed to follow the instructions of her family physician. **Indeed, the Defendants respectfully suggest that under the circumstances presented here, this failure should not be considered "pre-treatment" negligence at all.** It is undisputed that Mrs. Shinholster was being treated by Dr. Vicencio for her high blood pressure – the condition primarily responsible for her stroke – for several months in 1994. Dr. Vicencio prescribed medication, which Mrs. Shinholster did not take, and asked her to return for monitoring and continuation of treatment, which she did not do. Later, having failed to follow these instructions, Mrs. Shinholster presented to Defendants for treatment in the emergency room with symptoms caused by her uncontrolled hypertension, and ultimately, suffered a fatal stroke. **Clearly, if Mrs. Shinholster had seen Dr. Vicencio in April of 1995 instead of Defendants Adams and Flaherty, and Dr. Vicencio had been sued for malpractice for failure to prevent Mrs. Shinholster's stroke, the jury would have been permitted, and required, to consider Mrs. Shinholster's failure to comply with Dr. Vicencio's instructions as evidence of Mrs. Shinholster's comparative fault to be apportioned in accordance with the applicable statutes. In this case, where subsequent treaters have been charged with malpractice for failure to prevent a stroke caused, in large part, by Mrs. Shinholster's uncontrolled hypertension, it should make no difference that the disregarded medical advice was given by a different doctor, or that it was given before April 7, 1995.**[10]

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[10] The Court of Appeals acknowledged that "**Clearly, a person who does not follow her doctor's orders and who therefore maintains a high blood pressure is contributing to her own death.**" (Appendix, p. 511a – Emphasis added) This being the case, it is also very clear that this type of non-compliance can properly be considered a proximate cause of the injury where the evidence is supportive of such a finding.

It may be acknowledged that there are some authorities from other jurisdictions that appear to support the Plaintiff's position. The trial court and the Court of Appeals have both relied, in particular, upon one such case – Harvey v Mid-Coast Hospital, 36 F Supp 2d 32 (ED Maine 1999) – where the U.S. District Court in Maine held that, under Maine's law, the principles of comparative fault do not apply in medical malpractice actions so as to require an apportionment of damages where the patient's negligent conduct merely provided the occasion for the allegedly negligent treatment at issue. The Defendants contend that this reliance on Harvey has been misplaced for a number of reasons. First, the court's holding in Harvey is peculiar in light of the applicable statutory provision and the facts presented. In that case, the plaintiff suffered brain damage after attempting suicide by ingesting an overdose of Tegretol, and the defendant physicians maintained that he had been comparatively negligent by virtue of the suicide attempt. Thus, the facts clearly suggested a causal connection between the plaintiff's conduct and the injury sustained.

Furthermore, Maine has a statutory comparative negligence statute which is similar to Michigan's statute. Without any Maine decision on point, the Harvey court cited a number of decisions from other states which appear to be fundamentally at odds with Maine's own statutory provision, which requires, without exception, that the plaintiff's comparative fault be apportioned, and the judgment entered accordingly. It is noteworthy that many of the decisions cited in Harvey involve application of the doctrine of contributory negligence, which, as previously discussed, operates to bar a plaintiff's claim in its entirety.[11] This may very well have influenced the holdings in these cases.[12]

[11] Maine's statutory provision, 14 M.R.S.A. § 156, is a hybrid, incorporating features of both contributory and comparative negligence. Under that provision, the plaintiff's comparative negligence operates as a bar to recovery if the plaintiff "is found by the jury to be equally at

Secondly, and more importantly, the Court should note that the Harvey court's holding appears to have been limited to the narrow question of whether "a plaintiff's pretreatment negligent conduct **that only provides the occasion for negligent medical treatment** can be presented to the jury in regard to its assessment of damages." 36 F Supp 2d at 36 (Emphasis added) Thus, it appears that the court may have overlooked or discounted the defendants' argument that the plaintiff's suicide attempt contributed as a proximate cause of the injury ultimately suffered. The Court should note that a number of the decisions cited in Harvey stand for the same proposition that pre-treatment negligence that merely provides the occasion for subsequent negligent treatment cannot be considered contributory or comparative negligence in medical malpractice cases. This suggests an assumption that the negligent treatment has caused a separate and distinct injury which, in turn, suggests that a different result might have been reached in a case such as this, where the evidence can reasonably

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fault." Thus, if the plaintiff's comparative fault is 50% or more, recovery is barred. In contrast, Michigan's statutes bar recovery of noneconomic damages where the plaintiff's comparative fault is greater than 50%, but do not bar recovery of economic damages under any circumstances. MCL 600.2959. It should also be noted, in this regard, that a number of the decisions cited in Harvey have expressed concern that consideration of "pre-treatment" negligence may allow doctors to avoid being held accountable for negligent treatment. This concern does not apply in Michigan, where all defendants are held accountable according to their individual fault. The plaintiff's fault does not bar recovery; it merely reduces the amount of the damages which may be recovered.

[12] In the case of Brisboy v Fiberboard Corporation, 429 Mich 540; 418 NW2d 650 (1988), this Court observed that "Due to the complete bar of contributory negligence, courts took a more restrictive approach to contributory negligence and applied the particular risk doctrine to mitigate the harshness of the contributory negligence system." 429 Mich at 553-554 The Court held, in that case, that the risk of developing lung cancer is within the scope of the risk assumed by a smoker, and that the trial court had therefore improperly disregarded the jury's finding that the plaintiff, by his smoking, was 55% at fault for the lung cancer which he attributed to his exposure to asbestos fibers.

support a finding that the plaintiff's failure to follow medical instructions has contributed as a proximate cause of a single indivisible injury.[13]

Whatever the court's thinking may have been in Harvey, **it is clear that in this case, the Defendants have not merely alleged that Mrs. Shinholster's negligence provided "the occasion for negligent treatment." They have consistently maintained that her negligence was a direct cause of the stroke which ultimately led to her death.** Their argument has been properly supported by expert testimony expressing the opinion that her negligence was a proximate cause of her death.

Finally, and perhaps most importantly, Harvey and the decisions cited therein are in direct conflict with Michigan's statutory provisions, previously discussed, which clearly require the trier of fact to evaluate and apportion all of the plaintiff's comparative fault. Obviously, decisions from other jurisdictions cannot be deemed controlling to the extent that they conflict with Michigan's specific statutory requirements. The same applies with regard to the Restatement of Torts.[14] Indeed, this Court has often declined to follow a Restatement provision which is found to be inconsistent with the law of this state. In Kitchen v Kitchen, 465 Mich 654; 641 NW 2d 245 (2002), for example, the Court declined to follow a provision of the Restatement of Property pertaining to revocation of licenses for use of real property.

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[13] Any presumption that subsequent negligent treatment causes a separate and distinct injury overlooks the unfortunate fact that, despite all recent advances in medical technology, doctors are still unable to heal all injuries or cure all ills.

[14] The commentary accompanying the Third Restatement of Torts, Apportionment of Liability, § 7, appears to create a special exception which would require doctors to pay for the plaintiff's share of the injury while declining to impose the same obligation on other tortfeasors who have contributed to the same injury. *See:* Commentary, p. 84. This is clearly contrary to Michigan's statutory scheme imposing liability on all defendants according to their individual fault.

E. THE TRIAL COURT'S MODIFIED INSTRUCTION ON COMPARATIVE NEGLIGENCE DENIED THE DEFENDANTS A PROPER APPORTIONMENT OF THE DECEDENT'S COMPARATIVE FAULT, AND THEREBY DENIED THEM A FAIR TRIAL IN THIS CASE.

The trial court's erroneous ruling, and the resulting modification of the standard instruction in conformance with that ruling, cannot be considered harmless in this case. The evidence was amply sufficient to support a finding that Mrs. Shinholster's negligence prior to April 7, 1995 was a substantial cause of her death. The evidence presented also proved that Mrs. Shinholster had been warned of the dangers of high blood pressure, and thus knew, or should have known, that it was essential to take her prescribed medication and follow her doctor's instructions to keep her hypertension under control. Thus, the standard instruction on comparative negligence should have been given without modification, as requested by the Defendants' counsel.

Despite the court's erroneous instruction, the jury found Mrs. Shinholster to be 20% at fault for her death. Had the jury been properly instructed, it is likely that the percentage of her comparative fault would have been determined at a much higher level. This could have made a very substantial difference in the amount of the Judgment, considering the amount of the damages found. Indeed, if properly instructed, the jury might very well have concluded that Mrs. Shinholster's negligence accounted for more than 50% of the total fault, and in that event, the Plaintiff could not have recovered any noneconomic damages. MCL 600.2959. Under these circumstances, the trial court's erroneous modification of the standard instruction cannot be deemed harmless. The Defendants have clearly been prejudiced, and should therefore be granted a new trial.

II. THE TRIAL COURT ERRONEOUSLY APPLIED THE HIGHER STATUTORY CAP ON NONECONOMIC DAMAGES IN THIS WRONGFUL DEATH CASE, WHERE THE DECEDENT WAS NO LONGER SUFFERING FROM ANY OF THE PERMANENT CONDITIONS REQUIRING APPLICATION OF THE HIGHER CAP.

In this case, the jury was improperly asked to return a special verdict answering two interrogatories designed to determine whether the higher, or lower, cap on noneconomic damages should be applied in this case.[15] The first of these interrogatories, set forth in the Jury Verdict Form (Appendix, pp. 483-487), inquired "Did Plaintiff's decedent, Betty Shinholster, suffer hemiplegia, paraplegia, or quadriplegia resulting in a total or permanent functional loss of one or more limbs caused by injury to the brain?" The second asked "Did Plaintiff's decedent, Betty Shinholster, suffer permanently impaired cognitive capacity rendering her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living?" The jury responded affirmatively to each of these questions, and the trial court has determined, based upon these responses, that the higher cap should be applied in this case.

The Defendants contend that the noneconomic damages awarded in this case must be reduced to the lower cap.[16] The lower courts have misconstrued the pertinent statutory language, and thus, have clearly erred in finding that the higher cap applies in this wrongful death case, where the decedent no longer suffers from any of the permanent conditions which permit application of the higher cap.

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[15] Submission of this issue to the jury was inappropriate because the 1993 medical malpractice tort reform legislation amended MCL 600.1483 and MCL 600.6304 to clarify that the applicability of the statutory caps is a question of law for the court.

[16] At the time of entry of the Judgment in this case, the lower cap, adjusted for inflation, was $328,700.00. The higher "hard cap" was $587,000.00 at that time.

A. THE STANDARD OF REVIEW

This issue presents a question of statutory construction, a question of law, which must be reviewed *de novo*. Haberkorn v Chrysler Corporation, *supra.*

B. THE STATUTORY CAP ON NONECONOMIC DAMAGES

MCL 600.1483 imposes limitations upon the amount of noneconomic damages which may be recovered in actions alleging medical malpractice. Section 1483 was added to the Revised Judicature Act as a part of the tort reform legislation of 1986 – 1986 P.A. No. 178. As originally enacted, this section limited damages for noneconomic loss to $225,000 but provided several exceptions, which specifically included all cases where a death had occurred.

MCL 600.6098, also added by the 1986 legislation, requires the court to set aside any portion of a verdict for noneconomic damages which exceeds the amount of the statutory limitation established in § 1483. That section provides, in subsection (1), that:

> "A judge presiding over an action alleging medical malpractice shall review each verdict to determine if the limitation on noneconomic damages provided for in section 1483 applies. If the limitation applies, the court shall set aside any amount of noneconomic damages in excess of the amount specified in section 1483."

Section 1483 was amended by the 1993 medical malpractice tort reform legislation – 1993 P.A. No. 78. This amendatory legislation raised the statutory cap on noneconomic damages from $225,000 to $280,000, eliminated the previously existing exceptions to the cap, including the exception for cases involving a death, and replaced the prior exceptions with three more narrowly drawn exceptions, to which a new "hard cap" of $500,000 was applied. The new limitations are now stated in § 1483(1) as follows: [17]

[17] Section 1483 still requires that the statutory limitations of noneconomic damages set forth in subsection (1) be adjusted annually for inflation. Section 6098 was not amended by the 1993 act.

"(1) In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed $280,000.00 unless, as a result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed $500,000.00:

(a) The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:

(i) Injury to the brain.
(ii) Injury to the spinal cord.

(b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.

(c) There has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate."

The 1993 tort reform legislation also added a new provision to MCL 600.6304 which, like § 6098, also requires the court to reduce verdicts for noneconomic damages in excess of the applicable limitations provided in section 1483. This provision, which now appears as subsection 6304(5)[18], provides:

"In an action alleging medical malpractice, the court shall reduce an award of damages in excess of 1 of the limitations set forth in section 1483 to the amount of the appropriate limitation set forth in section 1483. The jury shall not be advised by the court or by counsel for either party of the limitations set forth in section 1483 or any other provision of section 1483."

Thus, there is no longer an exception to the statutory cap for cases in which a death has resulted. The new cap of $280,000, adjusted for inflation pursuant to subsection 1483(4),

[18] The 1993 legislation added this provision as a new subsection (6) of section 6304. Section 6304 was subsequently amended by the tort reform legislation of 1995 – 1995 P.A. Nos. 161 and 249. These amendatory acts renumbered this subsection, but did not change its substantive content.

and its implementing provisions in §§ 6098 and 6304, are applicable to any medical malpractice action unless one of the new exceptions is found to apply. If one or more of the new exceptions applies, the statutory cap is increased to $500,000.

C. THE EXCEPTIONS TO THE LOWER CAP DO NOT APPLY IN THIS CASE.

Although § 1483 is now applicable to medical malpractice claims in wrongful death cases by virtue of the 1993 legislation, the exceptions supporting the higher "hard cap" do not apply in this wrongful death case, where the victim of the alleged malpractice was no longer living at the time of the trial. Death is no longer an exception to the cap, and the statutory language defining the exceptions which make the higher cap applicable obviously refer to a living plaintiff who must continue to live with one of the three permanent conditions enumerated as exceptions to the lower cap.

Plaintiff has not disputed the fact that death is no longer an exception to the cap, but has argued, instead, that Mrs. Shinholster's condition before her death established two of the criteria required for application of the higher cap. This argument, adopted by the lower courts, is clearly contrary to the plain language of the statute and the obvious intent of the 1993 amendatory legislation. Each of the three exceptions currently provided in the statute refers to a "permanent" injury. The obvious intent underlying the adoption of these exceptions was to allow compensation for pain and suffering at a higher level for surviving plaintiffs who must continue to live their lives while handicapped by one or more of the serious, permanent injuries enumerated.

This intent has been made clear by the Legislature's choice of language. The first of the two new exceptions relied upon in this case refers to a Plaintiff who **is** hemiplegic, paraplegic, or quadriplegic due to an injury to the brain or spinal cord. The second applies to

a Plaintiff who **has** permanently impaired cognitive capacity. This language, which refers to the plaintiff in the present tense, obviously contemplates a plaintiff who is still alive at the time of entry of judgment. A deceased individual no longer exists, except in memory, and thus does not continue to "be" anything tangible. Nor does the deceased individual continue to "have" any condition, permanent or otherwise. Although it may be said that a deceased person has lost the function of his or her limbs, cognitive abilities, and ability to procreate, it is not reasonable to assume that the Legislature would have defined death in such a circuitous fashion, particularly where death was once specifically made an exception to the cap, and that exception was purposefully eliminated by the 1993 legislation.

In its Opinion and Order denying Defendants' motion for post-judgment relief (Appendix, pp. 491a-503a) , the trial court acknowledged the Legislature's use of the present-tense verbs "is" and "has" but inquired "present tense of what?" The court went on to note that "If the legislature had meant to refer to the condition of the injured party at a particular time, logic dictates that it would have specified the event that the time is to be calculated by." (Appendix, p. 497a) The court continued, noting that "Without such a reference point, the only sensible way to interpret the statute is to hold that the Legislature intended it to apply to people who had been rendered cognitively incapable, quadriplegic, etc., from the accident in question." (Appendix, p. 498a) Similarly, the Court of Appeals has concluded that the statutory exceptions to the lower cap apply whenever it appears that the plaintiff has had, or suffered from, one or more of the enumerated permanent conditions at "any time after and as a result of the negligent action." (Appendix, p. 519a)

This, however, is not what the statute says. The lower courts have rewritten it, and in doing so, have violated well established rules of statutory construction. Furthermore, the trial

court's logic is flawed because the statutory scheme **does** provide a temporal point of reference for determining the applicability of the cap – **after the rendition of the verdict**. It is at this time that **the court** is to make the determination as to whether the cap applies. MCL 600.1483; MCL 600.6098; MCL 600.6304 Because it is the court's responsibility to make this determination, any finding of fact by the jury as to the statutory criteria is not controlling. Indeed, it is clear, in light of the language of §§ 1483 and 6304(5), that the jury should not have been asked to make this determination at all. Thus, the clear language of the statute requires the court to determine, **after the verdict**, whether the plaintiff **is** hemiplegic, paraplegic, or quadriplegic or **has** permanently impaired cognitive capacity.

The lower courts' construction of the statute is flawed for a number of reasons. First, it disregards the plain language of the statute. Second, it relies upon the insertion of additional language that the Legislature could have used, but did not, and thus, amounts to inappropriate judicial legislation. Third, it is contrary to the obvious intent of the 1993 legislation, as noted previously.

The primary goal of statutory construction is, of course, to ascertain and give effect to the intent of the Legislature. Heinz v Chicago Road Investment Company, 216 Mich App 289, 295; 549 NW 2d 47 (1996) *lv den,* 445 Mich 865 (1997); Morrison v Dickinson, 217 Mich App 308, 315; 551 NW 2d 449 (1996). Statutes are to be interpreted as a whole, and construed so as to give effect to each provision and to produce a harmonious and consistent result. Grand Traverse County v State of Michigan, 450 Mich 457; 538 NW 2d 1 (1995); State Department of Treasury v Campbell, 107 Mich App 561; 309 NW 2d 688 (1981).

Michigan case law has repeatedly emphasized that, where the meaning of statutory language is clear, it must be applied as written, and that changes should be effected, not by

judicial interpretation, but by appropriately enacted legislation. *See:* In Re Certified Question from the United States Court of Appeals for the Sixth Circuit, 468 Mich 109, 113; 659 NW 2d 597 (2003); Paulitch v Detroit Edison Co., 208 Mich App 656, 662-663; 528 NW 2d 200 (1995), *lv granted*, 451 Mich 899 (1996); *order granting leave vacated*, 453 Mich 967 (1996); Department of Transportation v Thrasher, 196 Mich App 320; 493 NW 2d 457 (1992), *aff'd*, 446 Mich 61; 521 NW 2d 214 (1994); People v Guthrie, 97 Mich App 226; 293 NW 2d 775 (1982).

Where the language of a statute is of doubtful meaning, the courts must "look to the object of the statute in light of the harm it is designed to remedy, and strive to apply a reasonable construction that will best accomplish the Legislature's purpose." Michigan *ex rel.* Wayne County Prosecutor v Bennis, 447 Mich 719, 732; 527 NW 2d 483 (1994), citing Marquis v Hartford Accident and Indemnity, 444 Mich 638, 644; 513 NW 2d 799 (1994).

The pertinent language of § 1483 is clear and unambiguous. As noted previously, the plain language of the statute clearly contemplates a plaintiff who is living at the time of the verdict. This, again, is made clear by the Legislature's use of the present tense verbs "is" and "has." The trial court must make its determination as to the applicability of the caps after the verdict, and clearly, it cannot be properly concluded that the victim of malpractice "is" or "has" anything if he or she is deceased at that time. When a statute uses words in the present tense, that is the construction that must be given to them. City of Gaylord v Beckett, 378 Mich 273, 316; 144 NW 2d 460 (1966) (Addendum by Justice Adams); DesJardin v Lynn, 6 Mich App 439; 149 NW 2d 228 (1967) The statutory language referring to the plaintiff in the present tense is clear, and must therefore be applied as written.

The trial court has disregarded this plain meaning in favor of its assumption that the Legislature intended for these exceptions to apply "to people who had been rendered

cognitively incapable, quadriplegic, etc., from the accident in question." (Appendix, p. 498a – Emphasis added) The Court of Appeals has taken similar liberties in its construction of the statutory language in reaching its conclusion that the lower cap applies whenever it appears that the plaintiff has had, or suffered from, one or more of the enumerated permanent conditions at "any time after and as a result of the negligent action." (Appendix, p. 519a)

Thus, both lower courts have relied upon the insertion of additional language which the Legislature could have used, but did not. Clearly, if the Legislature had intended the meaning envisioned by the Plaintiff and the lower courts, it could have used appropriate language making these exceptions applicable to any plaintiff who "was," or "had been" rendered hemiplegic, paraplegic, quadriplegic, or cognitively impaired, by the defendant's malpractice, or to any plaintiff who "has suffered" any of the permanent injuries enumerated. It may reasonably be assumed that the Legislature would have done so if this had, indeed, been its intent. It did not.

This insertion of additional language that the Legislature could have used, but did not, is plainly at odds with the well established rule of statutory construction that courts "eschew the insertion of words in statutes." Courts will only insert words into a statute in very rare circumstances, when necessary to give intelligible meaning or to avoid absurdity. Empire Iron Mining Partnership v Orhanen, 455 Mich 410, 424; 565 NW 2d 844 (1997); MESC v General Motors Corp., 32 Mich App 642, 646; 189 NW 2d 74 (1971); Great Lakes v Employment Security Commission, 6 Mich App 656, 661; 150 NW2d 547 (1967). In light of this long-standing aversion to insertion of additional language, this Court has often emphasized that it is loath to "rewrite or embellish" statutory language. Byker v Mannes, 465

Mich 637, 646-647; 637 NW 2d 210 (2002); Olemchuk v City of Warren, 461 Mich 567, 575; 609 NW 2d 177 (2000)

No judicial embellishment is required to give intelligible meaning to § 1483. Its language is clear. Nor is it necessary, or appropriate, to read additional language into the statute in order to avoid any absurd result. First of all, there is no absurdity in the application of § 1483 as written. As noted previously, it is evident, from the language used, that the Legislature wished to reserve application of the higher cap for those cases where a surviving victim of malpractice must live the remainder of his or her life crippled by one or more of the serious, permanent injuries listed as exceptions to the lower cap. There was good reason for doing so, and the wisdom of this choice cannot be second-guessed. Furthermore, when the statutory language is clear and unambiguous, as it is here, it may not be departed from even to avoid a seemingly absurd result. People v McIntyre, 461 Mich 147, 155-158; 599 NW 2d 102 (1999); Decker v Flood, 248 Mich App 75, 84; 638 NW 2d 163 (2001)

The Plaintiff is dissatisfied with the result, but this does not justify departure from the clear meaning of the statute. The insertion of additional terms into this statute to broaden the scope of these exceptions amounted to inappropriate judicial legislation in this case. If it is felt that the exceptions should apply to the extent envisioned by the Plaintiff and the lower courts, this should be suggested to the Legislature. It is not appropriate for any court to make this change by judicial fiat.

For all of the foregoing reasons, Defendants contend that the trial court was required to apply the lower cap in this wrongful death case, where Mrs. Shinholster was no longer suffering from any of the permanent conditions requiring application of the higher cap. Thus, if this Court does not grant a new trial, this matter should be remanded to the trial court for

entry of an Amended Judgment which limits the jury's award of noneconomic damages in accordance with the lower cap provided under § 1483. If a new trial is granted, this Court should still provide its guidance as to this issue to ensure proper application of the statutory cap on remand.

III. THE TRIAL COURT ERRONEOUSLY DETERMINED THAT IT WAS NOT REQUIRED TO REDUCE THE JURY'S AWARD OF FUTURE DAMAGES TO PRESENT VALUE IN THIS CASE.

In this case, the jury awarded five years of future economic damages, at $9,700 per year, for a total of $48,500. It awarded five years of future noneconomic damages at $62,500 per year, for a total of $312,500.[19] The Defendants requested that these awards of future damages be reduced to present value, as required by MCL 600.6306.[20] The trial court denied this request, and the Court of Appeals has affirmed the trial court's decision, based upon their findings that the requirements of § 6306 did not apply in this case by virtue of the exception provided in MCL 600.6311.[21] The Defendants contend that this finding was also erroneous because the exception provided in § 6311 clearly does not apply in this action for wrongful death.

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[19] Jury Verdict Form (Appendix, pp. 483a-487a)

[20] Reduction of these awards to present value would have reduced the total award for future economic damages to $41,995.92, and the total award for future noneconomic damages to $270,592.29. Thus, reduction to present value would have reduced the award for future economic damages by $6,504.08, and the award for future noneconomic damages by $41,907.71. The total reduction of the award would have been $48,411.79.

[21] Section 6311 provides that "Sections 6306(1)(c), (d), and (e), 6307, and 6309 do not apply to a plaintiff who is 60 years of age or older at the time of judgment."

A. THE STANDARD OF REVIEW

The resolution of this issue turns upon the construction of § 6311. This, like all questions of statutory construction, is a question of law which must be reviewed *de novo.* Haberkorn v Chrysler Corporation, *supra.*

B. THE JURY'S AWARD OF FUTURE DAMAGES MUST BE REDUCED TO PRESENT VALUE PURSUANT TO MCL 600.6306 BECAUSE THE EXCEPTION PROVIDED UNDER MCL 600.6311 DOES NOT APPLY IN WRONGFUL DEATH CASES.

In the trial court, Plaintiff's counsel argued that, by virtue of the exception provided in MCL 600.6311, the requirement for reduction of the future damage awards to present value did not apply because Johnnie Shinholster, the husband of Mrs. Shinholster and the Personal Representative of her estate, was over 60 years of age at the time of entry of the Judgment. Defendants responded that the Legislature could not have intended for this exception to apply to personal representatives in wrongful death cases, who need not even be related to the deceased.[22] The trial court avoided this difficulty by adopting a theory different from that proposed by the Plaintiff. In its Opinion and Order denying the Defendants' motion for post-judgment relief, the trial court held that the reference to the "plaintiff" in § 6311 refers, in this case, to the deceased, who would have been over 60 years of age if she were still alive. (Appendix, pp. 494a-496a)

The Court of Appeals determined that § 6311 is ambiguous with regard to the term "plaintiff" in wrongful death cases, but concluded that it was unnecessary to resolve the

[22] The Defendants noted, in this regard, that if Plaintiff's interpretation of the statute were accepted, a personal representative over 60 could be appointed for the sole purpose of avoiding the required reduction to present value, and argued that the Legislature could not have intended this.

ambiguity because the age requirement was satisfied by Mrs. Shinholster and the Personal Representative of her estate. (Appendix, pp. 521a-522a) Like the trial court, the Court of Appeals did not disagree that it would be illogical to consider the personal representative the "plaintiff" for purposes of § 6311. The Court of Appeals did not address the Defendants' argument that it would also be illogical, and inconsistent with the statutory language and its evident purpose, to consider Mrs. Shinholster the "plaintiff" under § 6311.

It may be acknowledged that § 6311 is ambiguous with regard to the term "plaintiff" in wrongful death cases, as the Court of Appeals has noted.[23] The Defendants do not agree, however, that it is unnecessary to resolve this ambiguity. When one interpretation of this ambiguous statute is contrary to established rules of construction and the evident purpose of the legislation, and another produces an absurd and obviously unintended result, it will not do to simply say it doesn't matter. This is particularly true where a third, more sensible, construction may be employed to properly effectuate the Legislature's apparent intent. That alternative construction, which the Defendants respectfully urge the Court to adopt in this case, is that the reference to the "plaintiff" in § 6311 contemplates a living plaintiff, and that the exception established by that provision therefore does not apply in wrongful death cases.

To conclude, as the lower courts have, that the reference to the "plaintiff" in § 6311 may refer to the decedent in a wrongful death case, is contrary to the evident purpose of the statute, which was to allow elderly plaintiffs to receive the full value of their awards in personal injury cases. It is also inconsistent with the proper construction of the statutory

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[23] The reference to the "plaintiff" in § 6311 is different, in this regard, from the reference to "the plaintiff" in § 1483. In § 1483, "the plaintiff" obviously refers to the victim of the alleged malpractice. It is not clear, from the language of § 6311, who qualifies as a "plaintiff" under that provision.

language. As with the exceptions to the lower cap on noneconomic damages, the Legislature's use of a present tense verb – "a plaintiff who **is** 60 years of age or older **at the time of judgment**" – clearly suggests an intent to limit the application of this exception to plaintiffs who are still living at the time of judgment.

This interpretation is fully consistent with the obvious purpose of this provision to allow living elderly plaintiffs the full measure of their recovery. Again, the primary goal of statutory construction is to ascertain and give effect to the intent of the Legislature. Heinz v Chicago Road Investment Company, *supra*; Morrison v Dickinson, *supra*. Where the language of a statute is of doubtful meaning, a court must look to the object of the statute in light of the harm it is designed to remedy, and strive to apply a reasonable construction that will best accomplish the Legislature's purpose." Michigan *ex rel.* Wayne County Prosecutor v Bennis, *supra*.

The requirement for reduction of future damages to present value was one of the tort reform measures adopted by the 1986 tort reform legislation – 1986 P.A. No. 178. Its purpose was to provide defendants relief from excessive judgments for future damages in personal injury actions, based upon the assumption that plaintiffs would be able to make up for the reduction through prudent investment of the proceeds.

The evident purpose of § 6311 was to exempt elderly plaintiffs from this requirement, and a number of good reasons for doing so come to mind. First, many elderly plaintiffs are retired and living on fixed incomes, and need the proceeds of their judgments for their living expenses or other retirement plans. For many of these individuals, investment of the proceeds may not be a viable option. It was presumably for this reason that § 6311 also exempts plaintiffs over 60 years of age from the requirements §§ 6307 and 6309, pertaining to

structured payments and the purchase of annuity contracts in cases where future damages exceed $25,000. Second, elderly plaintiffs who are able to invest their proceeds may, by virtue of their circumstances, be unwilling or unable to make long-term or higher risk investments which are more attractive and accessible to younger investors.

The laudable purpose of § 6311 is not served in a wrongful death case where the victim of the alleged malpractice is deceased, and most, if not all, of the parties receiving the award may be far younger than 60 years of age. This case is a good example. In this case, Mrs. Shinholster's widower is the only one of the parties in interest who is claimed to be over age 60. The rest are Mrs. Shinholster's children and grandchildren, who are all much younger. If the Judgment in this matter should ultimately be upheld, these individuals will have an opportunity to invest their proceeds over the long-term at rates which will exceed the 5% rate used under § 6306(2) for reduction of their future damages to present value. Thus, if they choose to invest their proceeds wisely, they will come out farther ahead in the long run. These individuals do not need the protection that § 6311 affords to elderly plaintiffs. This being the case, it is neither necessary nor appropriate to deny the Defendants the reduction to present value to which they are entitled under § 6306.

The alternative construction proposed by the Plaintiff in the trial court – that the term "plaintiff" in § 6311 should refer to Johnnie Shinholster, the Personal Representative of Mrs. Shinholster's estate, and the nominal Plaintiff in this case – is also contrary to the evident legislative intent underlying the adoption of that provision. Again, the Court should note that the personal representative is only the nominal plaintiff in this matter; the true Plaintiff is the estate, which is, of course, a legal entity much less than 60 years of age. Although Mr. Shinholster certainly has his own personal interest apart from his interest as personal

representative, the real parties in interest are the estate and the various parties who are entitled to share the distribution under MCL 600.2922, most of whom are under 60 years of age, as noted previously.

Mr. Shinholster has been named as the "plaintiff" in this matter solely by virtue of his legal status as Personal Representative. As such, he was empowered to bring this action on behalf of the estate and the other interested parties, but cannot be held personally liable for any costs assessed in this matter. Clearly, he would not have standing to pursue this action in his own, individual, capacity.

The major difficulty with Plaintiff's proposed construction of § 6311 is that the personal representative can be anyone, of any age, and need not even be related to the decedent, the alleged victim of malpractice. Thus, if the term "plaintiff" in § 6311 is deemed to include the personal representative of the estate in a wrongful death case, the requirement for reduction of future damages to present value under § 6306 could be avoided by the simple expedient of choosing a personal representative who happens to be over the age of 60 years. This could be accomplished, either by the original appointment, or by a contrived resignation and appointment of a successor prior to entry of judgment. Obviously, the Legislature could not have intended to sanction this type of manipulation of the judicial system. When the statutory language is ambiguous, and therefore in need of construction, this Court should not assume that the Legislature intended to promote such an illogical and absurd result.

To avoid such absurd and obviously unintended results, this Court can, and should, construe § 6311 to apply only to living plaintiffs. The Court may properly construe a statute so as to avoid an absurd or obviously unintended result where, as here, the statutory language is ambiguous. People v McIntyre, *supra*, 461 Mich 147, 155-158 Again, the evident

legislative intent underlying the adoption of § 6311 was to protect the interests of elderly surviving plaintiffs. That purpose is not served by applying its exception in a wrongful death case, where the victim of the alleged malpractice is deceased, and the personal representative and other parties in interest may, or may not, be over 60 years of age.

For all of these reasons, the Defendants contend that § 6311 simply does not apply at all in this case, and that they are therefore entitled to a reduction of all future damages to present value pursuant to § 6306. The lower courts' rulings to the contrary are manifestly erroneous, and should therefore be reversed.

RELIEF

WHEREFORE, Defendants-Appellants Mary Ellen Flaherty, M.D. and Katherine Adams, Personal Representative of the Estate of Dennis E. Adams, M.D., Deceased, respectfully request that this Honorable Court reverse the erroneous decisions of the lower courts and remand this matter to the Wayne County Circuit Court for a new trial. Alternatively, Defendants request that this matter be remanded to the trial court with instructions to enter an Amended Judgment limiting the award of noneconomic damages in accordance with the lower cap on noneconomic damages provided in MCL 600.1483, and reflecting a reduction of all future damages to present value in accordance with MCL 600.6306(c) and (e).

Respectfully submitted,

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